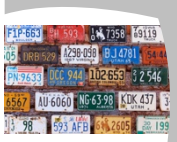


O 1st QUARTER | O 2019

Navigational Beacon

NAVIGATING YOU THROUGH THE VARIOUS EMPLOYMENT & HR ISSUES THAT YOU ENCOUNTER AS YOU JOURNEY TO BUSINESS SUCCESS

While we had hoped for a definitive answer on sexual orientation protection, or lack thereof, in the Fifth Circuit, this decision may not be as definitive as we think.

5th Circuit Rules on Sexual Orientation Discrimination

In a February 6, 2019 decision from the Fifth Circuit Court of Appeals (*Wittmer v. Phillips 66 Company*), the court addressed an appeal from a U.S. District Court case from the Southern District of Texas in which a transgender woman sued for discrimination under Title VII. Specifically, she sued for discrimination on the basis of transgender status. The defendant, Phillips 66 Company, did not take a position on whether Title VII prohibited discrimination on the basis of transgender status but instead sought dismissal of the case (summary judgment) on the grounds that the plaintiff failed to state a prima facie case of discrimination on the basis of transgender status and that the plaintiff failed to present a genuine issue of material fact that the non-discriminatory reason provided by Phillips 66 was pretextual (essentially, that the Plaintiff couldn't establish the defendant's reason for the adverse action was false). The District Court granted the dismissal (summary judgment) on both grounds but in its decision (1) indicated that the Fifth Circuit had not addressed the issue of transgender protection under Title VII and (2) found that Title VII prohibited transgender discrimination. The plaintiff (*continued on next page*)

Resources

Want more information? Visit our website and click on the "Resources" tab to find past issues of the quarterly newsletter as well as our blogs on various issues and our video tips. You can also find our video tips on our YouTube channel at www.youtube.com/SimonPaschalPLLC. In addition, you can find helpful tips and information about our upcoming speaking engagements (as well as just keep up with our shenanigans) on our Facebook page, our Twitter handle, and our LinkedIn page. Connect with us and stay up to date!

(*continued from Page 1*) appealed, thus bringing the issue before the Fifth Circuit. In its decision, the Fifth Circuit noted that it *had* addressed the issue of sexual orientation and transgender protection under Title VII – in a 1979 opinion in which it held that Title VII does not prohibit discrimination on the basis of sexual orientation. The Court stated that the 1979 decision remained binding precedent in the Fifth Circuit. What is notable, though, is that the Court then went on to say that it was affirming the district court's decision "on other grounds," meaning that the issue before the Court and on which it rendered its decision was not the specific and explicit issue of whether sexual orientation and transgender status are protected categories under Title VII.

As the Court noted, the issue of sexual orientation/transgender status was given particular attention in amicus briefs to the Court (amicus briefs are briefs written by non-parties to the lawsuit asking the Court to rule one way or the other). Specifically, the EEOC filed an amicus brief asking the Court to hold that Title VII prohibited discrimination on the basis of transgender status, and other organizations led by the National Center for Lesbian Rights filed an amicus brief asking the Court to hold that Title VII prohibited discrimination on the basis of transgender status.

Again, though, despite the heightened attention on extending Title VII protection, the Court decided the case "on other grounds." First, the Court found that the plaintiff failed to establish a prima facie case of discrimination. Specifically, she failed to present evidence that any non-transgender applicants were treated better. Second, the plaintiff failed to establish pretext. Specifically, Phillips 66 identified a legitimate, non-discriminatory reason for rescinding its job offer (the plaintiff's misrepresentations) and the plaintiff presented no evidence that this reason was false or lacked credibility.

To further muddy the water, one of the judges in the three-judge panel that issued the decision, Judge Patrick E. Higginbotham, issued a concurring opinion that consisted of a single paragraph. That concurring opinion stated as follows: "I concur fully in the dismissal of [the plaintiff]'s Title VII claim on the grounds stated in the majority opinion. [The 1979 decision] was decided decades before Lawrence v. Texas, 539 U.S. 558 (2003), invalidated laws criminalizing same-sex sexual conduct, and we have never since relied on [the 1979 decision] for its holding that Title VII does not cover sexual orientation discrimination. Neither party, in the district court or this court, relied on or questioned [the 1979 decision]'s continued vitality – so, wisely I think, we do not reach here to resolve [the 1979 decision]'s endurance or the question of whether Title VII today proscribes discrimination against someone because of sexual orientation or transgender status. We do not because we cannot, even with elegant asides."

In reading Judge Higginbotham's concurrence, along with Judge James C. Ho's concurrence (which is 14 pages, notable because the decision itself is only 6 pages), it appears that there is a divide within the Fifth Circuit judges as to whether or not sexual orientation and transgender status are protected under Title VII. And as the Court noted, the Second, Sixth, and Seventh Circuits have already decided that sexual orientation or transgender status ARE protected under Title VII. In light of this, not only is it still somewhat unclear in the Fifth Circuit whether or not sexual orientation and/or transgender status are protected under Title VII, it is becoming clearer that this issue will be put before the U.S. Supreme Court in the coming future in order to get a definitive decision.

For now, by a small margin, we would say that within the Fifth Circuit, Title VII is not interpreted to cover sexual orientation and/or transgender status but because of the Fifth Circuit's decision in *Wittmer*, we can't say for certain that a district court would not find that they are.

Multi-State Employers: Don't Forget About State & Municipal Wage & Hour Laws

There are many state-based and municipal-based wage and hour laws (i.e., minimum wage, overtime, and more) that can apply whether or not you have a physical location in any particular state or municipality.

As a multi-state employer, there is a lot you have to keep up with. One area in which laws can really vary is the area of wage and hour laws. While the FLSA provides the federal baseline of minimum wage ($7.25/hour) and overtime (time and one-half the employee's regular rate of pay for all hours worked in excess of 40 in any given work week), federal law is also clear that with respect to any state or municipal laws regarding wage and hour, the law that is the most advantageous and/or favorable to the employee is the law that controls. This means that any state or municipality's law applies if that law provides a higher minimum wage or more favorable overtime scheme. One such example is the State of New Jersey, which just this year finalized legislation raising the state's minimum wage. The state's current minimum wage of $8.85 will rise to $10.00/hour on July 1, 2019 and $11.00/hour on January 1, 2020. Thereafter, it will increase by $1.00/hour every January 1 until it reaches $15.00/hour on January 1, 2024. As an employer, if you have an office in another state, you must pay the employees of that state any minimum wage the state requires above the federal minimum wage. Even if you don't have an office in the state, though, if you have employees working in the state, those employees must still receive the minimum wage that state proscribes. While that may seem pretty easy, employers must also be aware of city laws. For example, in the state of California, a number of cities have minimum wages higher than the federal minimum wage, including San Diego and San Francisco. If you have employees working in those cities, you must abide by the municipal minimum wages. All of these examples are just minimum wage and don't address the many different overtime schemes in various states and municipalities. In addition to all of that, many of the state and municipal minimum wages change annually and some states even have different requirements for exemptions from overtime compensation. As a result, it is important for multi-state employers to regularly conduct a wage and hour audit to ensure that they are paying above the minimum wage and that they are paying their overtime compensation properly.

Here We Go Again:
Department of Labor Proposes Change to Overtime Salary Test

On March 7, 2019, the Department of Labor issued proposed rule changes to the salary test for the so-called white collar overtime exemptions, thus reigniting the ongoing saga regarding these exemptions.

As you likely remember, several years ago, the Obama Administration made changes to the salary test that resulted in a lawsuit being filed in the U.S. District Court for the Eastern District of Texas. That court ultimately struck down the new rules and the white collar exemptions remained unchanged.

Following the election, the Trump Administration indicated that we would likely see some proposed changes to the white collar exemptions but indicated they would not be as extensive as the Obama Administration changes.

That has occurred. The proposed change would increase the salary requirement for the white collar exemptions from $455/week ($23,660 annually) to $679/week ($35,308 annually). The Administration is not proposing any changes to the duties test.

For now, there is nothing to do. The proposed rule change will be subject to a 60-day public comment period and further examination following this period. While the Administration has indicated it is a priority to get a final rule in place before the 2020 election, we can expect lawsuits to be filed to stop this change. We'll keep you updated!

The Employee Life Span

Some time ago, we gave a speech entitled *HR in an Hour: The Employee Life Span*, which covered employment law based on an employee's life span – application/interview through termination. Over the last several issues of our newsletter, we've been recreating that presentation and addressing the multitude of employment law issues facing employers and HR professionals. We continue that discussion here.

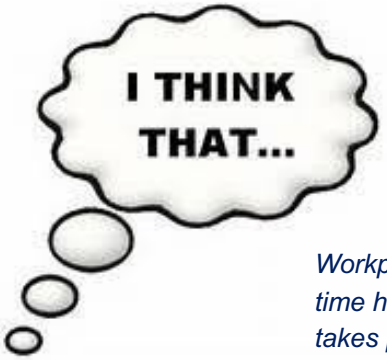
So far, we have discussed the beginning stages of the employee life span – the hiring process, at-will employment, immigration, drug testing, general policies, and wage and hour policies. In the last issue, we continued our discussion of the FLSA overtime exemptions, and we finish that discussion here.

Outside Sales Exemption – For this exemption, there is no minimum salary requirement. To be exempt under this exemption, (1) the employee's primary duty must be making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer and (2) the employee must be customarily and regularly engaged away from the employer's place or places of business. "Sales" is defined as any sale, exchange, contract to sell, consignment, shipment for sale or other disposition of property. Importantly, outside sales does not include sales made by mail, telephone, or the Internet UNLESS such contact is used merely as an adjunct to personal calls. Furthermore, a home office is considered the employer's place of business, so employers should take that into account.

In our discussion of the various FLSA white collar exemptions, we've used several terms that are defined specifically under the FLSA. Those terms are:

- Primary Duty – This means principle, main, major or most important duty the employee performs and is not necessarily based upon time spent performing the duty.
- Managing – Planning the work, assigning the work, selecting the workforce, planning and controlling the budget (a/k/a – the common understanding of managing).
- Customarily and Regularly – Greater than occasional but less than constant (i.e., normally done weekly).
- Particular Weight – Factors include frequency of recommendations, whether or not it is part of the employee's job duties, and the frequency with which the recommendations are relied upon.
- Matters of Significance – An analysis of the level of importance or consequence of the work performed; the focus is not simply that improper performance can cause significant loss to the employer.

Be sure to check out the next installment of The Employee Life Span in our next quarterly newsletter where we discuss employee/independent contractor classification.



The SP Opinion: The Importance of Training

Workplace training should be a lot more than a one-time harassment and workplace policies training that takes place when you first hire an employee.

When you hear workplace training, most employers probably think about that new hire training that consists of a policy overview and anti-harassment training. Maybe you also think of an annual anti-harassment training. Training is so much more than that. We know that as HR professionals, you have a ton of tasks you have to accomplish and training is not always the easiest thing to get done. But it's extremely important! Training is probably the single most important thing an employer can do to protect against lawsuits. Not only does it provide a defense in filed lawsuits and give you the chance to dismiss them, but it likely aids in preventing the lawsuit to begin with. How many issues might you resolve if your employees are well-trained on your policies and how to internally address any concerns so that they are resolved before they become a bigger issue? Of course, that starts with training your supervisors, a task that is often forgotten. Whether you like it or not, your front-line supervisors are members of your HR staff. They are usually the first people to spot an issue and the first (sometimes only) people to address it. You should use the axiom, "See something, say something" with your supervisors and train them intimately and extensively on HR and how to handle HR issues (at least preliminarily until they can bring them to you). Proper training will save you!

> "Training is probably the single most important thing an employer can do to protect against lawsuits."
> #SIMONPASCHALSAYS

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PointBank is an independent, locally owned bank that has been serving the Denton County community since 1884. They have nine branches located throughout Denton County and they provide full service banking services. We are proud to call PointBank a client and we honored that they have put their trust in us. We encourage you to check them out for any of your banking needs. You can learn more about them at www.pointbank.com. Thank you, PointBank, for being a valued Simon | Paschal PLLC client!

SIMON | PASCHAL PLLC Happenings

Welcome to the first issue of our newly redesigned Quarterly Newsletter! We hope you like it. If there is ever a topic you'd like to see us address or an opinion you'd like to hear about in our new opinion column, just let us know! You can always come hear us speak at any of our live speaking engagements. We've got the following presentations coming up: Frisco HR Summit on March 27, the Red River Valley SHRM Chapter (Paris, TX) monthly luncheon on May 15, a presentation to the Rose City SHRM Chapter (Tyler, TX) on May 23, and a presentation to the Permian Basin SHRM Chapter (Midland, TX) on June 25.

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